IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 317 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes.

3. Whether Their Lordships wish to see the fair copy of the judgement? No. : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No. : NO

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5. Whether it is to be circulated to the Civil Judge? To be circulated to the Criminal Courts only. : YES

LAKME LIMITED

Versus

STATE OF GUJARAT

Appearance:

MR PARESH M DAVE for Petitioner

MR AJ DESAI, APP for Respondent No. 1

MR AKSHAY H MEHTA for Respondent No. 2

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 18/01/2001

ORAL JUDGEMENT

1. M/s. Lakme Limited (now known as Trent Ltd.)

Petitioners - original accused No.1 has filed this Revision Application before this Court under Sec.397 read with Sec.401 of the Code of Criminal Procedure, 1973, (hereinafter referred to as `Code') against the order dated 3rd July, 2000, passed by the learned Chief Judicial Magistrate, Navsari, below Exh.90 in Criminal Case No.4061 of 1992. The learned Magistrate has rejected the application of the applicants wherein the applicants prayed that the court may stay the proceedings of Criminal Case No.4061/92 till the proceedings initiated vide show-cause-notice F.No.V(14F)-1/OA/86 dated 9.6.1986 are not finalised by the highest appellate authority under the provisions of the Central Excise Act, 1944 (hereinafter referred to as `the Act').

2. The facts giving rise to this application are as under:

2.1 M/s. Lakme Limited has been a Public Limited Company engaged in the business of manufacture of goods like cosmetics at the relevant time. The opponent No.2 Shri Abhaykumar Jyotisinh, office of the Assistant Collector of Central Excise and Customs, Surat, had filed a Criminal Complaint No.4061/92 before the Court of learned Chief Judicial Magistrate, Navsari, against the applicants under the provisions of Sec.9 of the Central Excise Act, 1944 (previously known as "The Central Excises and Salt Act, 1944"). The basis for filing this complaint against the applicant is an order dated 16.3.1990 passed by the Collector of Central Excise, Baroda, by which it was held that certain amount of duty was not paid by applicant - Lakme Limited. The said order was passed on the basis of a show-cause-notice No.V(14F)15-1/OA/86 dated 9.6.1986. The subject matter involved in the said show-cause-notice on which the order was passed by the Collector, Baroda, and the subject matter of the complaint filed against the applicant by opponent No.2 herein was the similar. The petitioners stated that the Central Excise Department had issued a notice dtd.9.6.1986 for alleged evasion of excise duty for which party claiming from April 1984 to December 1985. The said show-cause-notice was adjudicated and the Collector of Central Excise & Customs, Baroda, by his order dated 16.3.1990 pleased to confirm the said show-cause-notice and also imposed penalty of Rs.20.00 Lakhs on applicant No.1.

2.2 Being aggrieved and dissatisfied with the said order, the petitioners filed appeal before the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as `the Tribunal') bearing

Appeal No.E/1003/90-A and E/1099-1100/90-A. The Tribunal by his judgment and order dated 17th March, 1999, pleased to allow the appeal and remanded the matter back to the Central Excise & Customs Collectorate, Baroda.

3. Shri Akshay Mehta, learned Senior Standing Counsel appearing on behalf of the Opponent No.2 has informed me that the show-cause Notice is pending for adjudication before the Commissioner of Central Excise, Surat.

4. The Criminal Case which was pending since 17th April, 1992, the accused filed their application dated 21st December, 1999, before the Criminal Court and prayed that the criminal proceedings should not be further proceeded till the show-cause-notice finally adjudicated. The Superintendent, Central Excise has strongly objected to the same by filing their written submissions on 5th January, 2001. The learned Chief Judicial Magistrate, Navsari, by his judgment and order dated 3rd July, 2000, pleased to reject the said application. The learned Magistrate has held that still adjudication is to be done in this matter, the matter is very old and the criminal proceedings cannot be pending till the civil matter is to be adjudicated.

5. Being aggrieved and dissatisfied with the aforesaid order of the learned Chief Judicial Magistrate, the petitioners preferred this Criminal Revision Application before this Court in this behalf.

6. Shri Paresh M.Dave, learned counsel for the petitioners has relied upon Sec.9 of the Central Excises & Salt Act, 1944. The relevant Sec.9 of the said Act reads as follows:

"Sec.9. Offences and penalties :- (1) Whoever commits any of the following offences, namely:-

(a) contravenes any of the provisions of section 8 or of a rule made under clause (iii) or clause (xxvii) of sub-section (2) of section 37;

(b) evades the payment of any duty payable under this Act.

6.1 Learned counsel for the petitioners contended that the Courts - Supreme Court as well as this Court have consistently held that when appeal filed before the appellate forum prescribed under the Central Excise Act, or as the case may be, under the Customs Act, was

admitted and the same was pending, criminal case on the same subject matter should not be allowed to go on since the possibility of appellant succeeding in the appeal could not be ruled out and if the appeal thus succeeds, entire basis of criminal case would disappear. In support of the above submissions, he has relied upon the judgment of the Hon'ble Supreme Court in the case of G.L. DIDWANIA Vs. INCOME TAX OFFICER reported in 1999 (108) E.L.T. 16(S.C.) In para 3 and 4 the Supreme Court has observed as under:

"Mr.R.K.Jain, learned Senior Counsel, submits that the averments is the complaint would clearly show that the prosecution was sought to be launched on the basis that the appellant wrongly and falsely declared that the income of Young India and Transport Company does not belong to him and that he made a false verification to that effect and the income of Young India and Transport Company does belong to him and failing to include the said income of Young India and Transport Company in his income amounted to suppression and thus he was liable under Section 277 of the Income Tax Act and that in view of the fact that in the order of the Appellate Tribunal those conclusions reached by the assessing authority have been set aside; consequently, the very basis of the complaint is knocked out and, therefore, in the interest of justice the proceedings ought to have been quashed by the High Court. In support of his submission, he also relied on a judgment of this Court in Uttam Chand V. I.T.O. [1982] 133 ITR 909, wherein this court quashed the prosecution. It was observed in that decision that it would be clear from the order of the Tribunal that the assessee was a partner of the firm and the firm was a genuine firm. There is a reference to this judgment in another decision of this court in P. Jayappan V. S.K.Perumal, First Income Tax Officer [1984] 149 ITR 696.

"In the instant case, the crux of the matter is attracted and whether the prosecution can be sustained in view of the order passed by the Tribunal. As noted above, the assessing authority held that the appellant-assessee made a false statement in respect of Young India and Transport Company and that finding has been set aside by the Income-tax Appellate Tribunal. If that is the position then we are unable to see as to how

criminal proceedings can be sustained."

6.2 Over and above, the learned counsel has also relied upon the judgment of this Court in the Criminal Misc. Application No.484/86 decided by (Coram: G.T.Nanavati, J. as he was then) decided on 7th April, 1988, wherein on page 2 to 3 this Court has observed as under:

"The second prayer made by the petitioners deserves to be granted because in case the Tribunal allows the appeal, the very foundation on which the complaint is passed namely evasion of payment of duty will disappear. If the Tribunal decides in favour of the petitioners and the said decision becomes final then it will not be possible to say that the petitioners have evaded payment of duty and it will be difficult for the Excise & Customs Department to argue that the petitioners have committed the offence as alleged. Therefore, in order to avoid any harassment to the petitioners and other complication which may arise if the proceedings are allowed to go on, it will be proper and just to stay further proceedings till the appeal filed by the petitioners before the Tribunal is disposed of."

6.3 Learned counsel for the petitioners has also relied upon the judgment of this Court in the case of Shri Digvijay Cement Co.Ltd. Vs. State of Gujarat reported in 1991(53) E.L.T 292(Guj.). In that case Collector levied duty and penalty upon the manufacturer. An appeal was preferred by assessee before the Customs, Excise and Gold (Control) Appellate Tribunal. In the appeal and in the stay application the Tribunal has passed an order directing the petitioner to deposit 25% of the duty adjudged as due with the concerned Collector and also directing the petitioner to furnish to the satisfaction of the Collector a Bank guarantee for the balance amount and on that condition the penalty imposed was stayed and also dispensed with its predeposit pending and hearing of the appeal. The prosecution was launched with regard to order passed by the Collector. This Court (Coram: B.S.Kapadia,J.) in para 9 observed as under:

"Now, when the matter is pending before the Tribunal the possibility of allowing the appeal cannot be ruled out; and if that is so, possibly, the petitioner cannot be said to have committed any offence and it is in the interest of justice

to stay the proceedings of original case No.786/95 pending in the Court of the Judicial Magistrate, First Class, Additional (Rural) at Narol till the hearing of the aforesaid appeal, pending in the Tribunal. The application is allowed for the stay of the criminal proceedings as stated above. Rule is made absolute accordingly."

6.4 Learned counsel has also relied upon the judgment of this Court passed in Criminal Misc. Appln. No.407 of 1983 decided by this Court (Coram: S.D. Shah,J.) decided on 29.4.1994, wherein in para 6 the Court has observed as under:

"In the result, this application is partly allowed. Prayer for quashing the proceedings is rejected. But it is ordered that till the appeal preferred by the petitioners before CEGAT is finally disposed of by CEGAT, further proceedings of Criminal Case No.2608 of 1985 pending in the Court of Chief Judicial Magistrate, First Class, Vadodara are ordered to be stayed. Rule is made absolute to the aforesaid extent only."

6.5 The learned counsel for the petitioners has also relied upon the judgment of Madhya Pradesh High Court in the case of D&H Secheron Electrodes Vs. Assistant Collector, Central Excise, Indore reported in 1995 (79) E.L.T. 15 (M.P.). In that case the petitioners were carrying on business of stainless steel wire into such cut wire called filler wire. The Additional Collector by his order datd 21st December, 1984, held that process of conversion of S.S. Wire into filler wire amounts to manufacture and levied the duty and penalty accordingly. On the basis of the said order of the Additional Collector, department initiated criminal prosecution against the petitioners by filing a complaint stating therein that the petitioners had evaded payment of duty and had consequently liable to be prosecuted for offence under the Act. Being aggrieved and dissatisfied with the order of the Additional Collector dated 21st December, 1984, the petitioners preferred appeal before the Central Excise Tribunal and the Tribunal by its order dated 28th March, 1990, pleased to set aside the order of the Additional Collector and held that cutting of wire do not amount to manufacture and even cut wire known by different names. In view of this position, the Madhya Pradesh High Court has held as under:

"In this view of the matter, it cannot be held that the petitioners had evaded payment of duty.

> The very foundation of the complaint has thus become non-est by virtue of the order of the Central Excise Tribunal, the petitioners cannot be prosecuted and punished for offence under Section 9 of the Central Excises and Salt Act, 1944."

6.6 It may be noted that, in this case only proceedings are pending and Collector has not finally adjudicated and therefore to that extent I can only stay the criminal proceedings but the criminal proceedings cannot be quashed at this stage.

7. Shri Akshay Mehta, learned Senior Standing Counsel for the Union of India has tried to support the order of the learned Magistrate in this behalf. Shri A.J.Desai, learned APP for the State has also tried to support the case of the prosecution.

8. Shri Akshay Mehta, learned Counsel for the Revenue has relied upon in the case of K.SADASIVAM Vs. ENFORCEMENT OFFICER, ENFORCEMENT DTE., MADRAS reported in 1999(105) E.L.T. 269 (Mad.) In para 15 the Court observed as under:

> "However it cannot be denied that the decision in the appeal before the FERA Board in Appeal No.171 of 1993 will have a hearing in the Criminal Case in C.C.No.881/93. Even I can say that the judgment of the FERA Board in the appeal that will be preferred by the petitioner/accused in the event of not succeeding before the Magistrate Court can also be filed as an additional document on the side of the accused in the appeal that may arise in the criminal case in C.C.No.881/93 in future. Having waited so long, I am of the view that some reasonable time must be given to enable the petitioner accused to move the FERA Board to dispose of his appeal as expeditiously as possible within shortest possible time and get a verdict one way or the other before the FERA Board. Keeping in view this factor in mind I am of the opinion that a reasonable time must be given as held by His Lordship Mr.Justice T.S.Arunachalam, J., in the decision reported in 1991 (52) E.L.T. 168(Madras) and the reasonable time may be only six months and not more than that. Hence I hold that this petition is allowed and the order of the learned Additional Chief Metropolitan Magistrate (E.O.II) Egmore, Madras

in Crl.M.P.No.989/97, dated 22-12-1997 in C.C.No.881/93 is set aside, and the case in C.C.No.881/93 on the file of Additional Chief Metropolitan Magistrate (E.O.II) Egmore, Madras is adjourned or postponed till 31-8-1998, and thereafter no further adjournment or postponement of the trial in C.C.No.881/93 shall be given or extended by any one of the courts, and I answer this point accordingly."

8.1 In my view, Sec.9 as the marginal note indicates, deals with offences and penalties. Sub-section (1) contains 6 clauses which specify the offences :clauses (a) to (c), the first five clauses, deal with specific offences like evasion of payment of duty, or unlawful removal of excisable goods.

8.2 I have gone through the judgment of the Madras High Court. However, in view of judgment of the Supreme Court in G.I.Didwania's case (supra) and three judgments of this Court, I am of the view that till the Collector, Central Excise Surat decides finally, the criminal prosecution may not continue. It is nodoubt true that by this order there will be indefinite adjournment in the case, however, the order of the Collector, Central Excise Surat has a direct bearing on the criminal prosecution and if petitioners succeed before Collector then entire basis of prosecution will disappear and the assessee will not have to visit unnecessary the criminal courts. When the Collector has still not finally decided the matter the continuation of the criminal prosecution will result into feeling of the petitioner that petitioner is made victim of palpable injustice. In my view, the continuation of criminal prosecution will cause misery and harassment to the petitioner.

8.3 I am, therefore, of the view that till the Collector, Central Excise Surat decides the adjudication finally, the petitioners cannot be said to have committed an offence and it is interest of justice to stay the proceedings of original Criminal Case pending before the learned Chief Judicial Magistrate, Navsari, till the aforesaid case pending before the Collector, Central Excise Surat. The application is allowed for stay of the criminal proceedings as stated above.

9. I, therefore, quash and set aside the order dated 3rd July, 2000, passed by the learned Chief Judicial Magistrate, Navsari in Criminal Case No.4061 of 1992 and said criminal proceedings will be stayed till Collector, Central Excise Surat finally adjudicated. After the

order of the Collector, Central Excise Surat, the petitioners will be at liberty to move before appropriate forum in the appropriate proceeding. I, therefore, allow this Criminal Revision Application. Rule is made absolute to that extent. Interim relief which has been granted namely the proceedings of Criminal Case No.4061/92 pending before the learned Chief Judicial Magistrate, Navsari, be stayed till the Show-cause-notice No.V(14-F)15-1/OA/86 dated 9.6.1986 finally adjudicated by Collector, Central Excise Surat.

(K.M. Mehta, J.)

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